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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TELLY SHAUNTAY MITCHELL, Defendant and Appellant.	B283550 (Los Angeles County Super. Ct. No. MA069223)

APPEAL from the judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed.

Emily Lowther Brough, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Telly Shauntay Mitchell of torture (Pen. Code, § 206),[1] assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and corporal injury upon a person he was dating (§ 273.5, subd. (a)). As to the last two offenses, the jury found true the allegations Mitchell personally inflicted great bodily injury (§ 12022.7, subd. (e)). Mitchell admitted he had suffered a prior serious felony conviction constituting a strike (§ 667, subds. (a)(1), (b)-(i)) and served five prior prison terms (§ 667.5, subd. (b)). The trial court sentenced Mitchell to 14 years to life on the torture conviction, plus five years for the prior serious felony conviction and three years for three prior prison terms.

On appeal, Mitchell contends there is insufficient evidence to support his torture conviction, specifically, no substantial evidence that he harbored the "[specific] intent to cause cruel [and] extreme pain and suffering for the purpose of revenge . . . or for any sadistic purpose," within the meaning of section 206.[2] He also contends he was denied effective assistance of counsel by his trial counsel's failure to investigate Mitchell's mental health history and present a mental impairment defense to the torture charge. Finally, Mitchell contends that Senate Bill No. 1393

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

[2] Mitchell's argument, as briefed, is somewhat vague. He asserts there was insufficient evidence of intent to harm Johnson "for a sadistic purpose." Still later, he asserts there was insufficient evidence he had the specific intent to cause Johnson pain "for a sadistic purpose, i.e., for revenge." In his reply brief, Mitchell argues there was insufficient evidence he "acted with the specific purpose of revenge."

requires a remand so the trial court can exercise its discretion whether to strike his section 667, subdivision (a), prior serious felony conviction enhancement.[3] We reject these contentions and affirm the judgment.

BACKGROUND

Tinisha Johnson testified that on the morning of August 1, 2016, she was at her Lancaster apartment. Mitchell, her boyfriend, arrived about 6:00 a.m. or 7:00 a.m. The two had been dating for 15 years. After Mitchell entered the apartment, Johnson and he began using drugs. Johnson eventually stopped using drugs. More than an hour after Mitchell had arrived at the apartment, Johnson and he began arguing about Mitchell "getting high." Johnson was expecting company and wanted Mitchell to leave.

While in the living room, Johnson, using her hands, pushed Mitchell. Mitchell pushed her back.[4] Johnson entered the bedroom and continued arguing with Mitchell. After Mitchell slapped Johnson's face, she began hitting him; he then hit her in the head with his fists two to five times. He also threw a wooden chair at her. The chair hit Johnson's left arm and possibly her left hand. At some point, Mitchell threw or pushed Johnson around the room. Johnson ended up on the floor. Mitchell kicked

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[3] We received and have considered the supplemental letter briefs on this issue.

[4] Johnson stood five feet six inches tall; Mitchell was a little taller.

her face and neck. Johnson was bleeding from her head and nose.

After Mitchell kicked Johnson, they argued again. Johnson remembered "going crazy." Mitchell grabbed her. He tied her legs with a long string then tied her hands and wrists with an extension cord. Johnson felt a little afraid.[5] Mitchell loosely wrapped a cord "that plugs into something" around her neck. He repeatedly told Johnson to calm down. Mitchell held a screwdriver in his hand. He left the apartment immediately after he tied up Johnson. According to Johnson, before August 1, 2016, Mitchell had not been violent with her.

After Mitchell left, Johnson untied her wrists and ankles and, still afraid, jumped out of a first-floor window. She ran to the apartment of Christopher David, the apartment complex manager.

David testified that he and his roommate, Yemima Martinez, were in David's apartment. David heard sounds of running and someone pounding on his door. He opened the door and saw Johnson; she was crying, panicking, and covered in blood. Johnson said she was afraid Mitchell was going to get her. She entered David's apartment and locked the door. David observed that Johnson's head was bleeding. Around Johnson's neck was "a flat iron with an extension cord and some

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[5] A comparison of Johnson's trial testimony with the testimony of the neighbors and hospital nurse (discussed *post*) concerning Johnson's contemporaneous statements to them about what happened suggests that at trial Johnson sought to minimize what Mitchell did to her. We note Johnson testified at trial that she still loved Mitchell.

shoestrings." The shoestrings were tied tightly around her neck.[6] The "cord of the flat iron" was tied "really tight[ly]" around Johnson's neck.

Martinez testified she saw that Johnson had cords and shoelaces tied around her neck, and she could not breathe. Martinez also testified there was one "electrical cord from [a] flat iron wrapped around [Johnson's] neck," a flat iron was attached to the cord, and two shoelaces were tied around Johnson's neck. The "shoelaces were tied more tightly than the flat iron." David testified Martinez cut the cord and shoelaces from Johnson's neck.

Los Angeles County Sheriff's Deputy Daniel Rodriguez responded to the apartment complex at about 9:24 a.m. on August 1, 2016; he spoke with Johnson. Johnson's head was bleeding; she appeared to be afraid and in shock. She complained of neck pain. Her wrists were swollen and a little red, consistent with having been bound. When Deputy Rodriguez entered Johnson's apartment, it appeared that an altercation had occurred in the bedroom. Everything was in disarray; the mattress was off its box spring and stained with blood. Clothes were strewn everywhere.

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[6] The following occurred during David's direct examination: "Q. Did you notice any marks on [Johnson's] wrist when you saw her? [¶] A. Yes. [¶] Q. What did you notice? [¶] A. That she had bite marks on her arm. [¶] Q. How did they appear to you? What did you think when you saw them? [¶] A. Something else had been tight around her hands." It is not clear from the evidence when this biting occurred, nor is it clear from the above quoted testimony that David was referring to human bite marks as distinct from something (e.g., a ligature) "biting into" Johnson's wrists.

Johnson's eyes were red; blood flowed from her forehead and the lower back of her head. She was coughing continually but did not know why; her breathing was labored. Johnson's throat felt sore because, according to her, she had been screaming. She complained of neck pain, and "guess[ed]" it had been caused by Mitchell hitting her. She was taken to the hospital.

At the hospital, Johnson received five staples in her forehead. One of her braids had been torn from the back of her head, causing a laceration; the missing braid was found in her bedroom. The left side of her face was bruised. Healthcare professionals placed a cast on one of her hands to treat a fractured bone. Johnson felt pain in that hand for about a week.

According to Johnson, she told a nurse that she did whatever Mitchell asked her so he would stop hitting her. The cord had remained around her neck for 10 minutes. Johnson thought she was going to die.

Helen Withers, a registered nurse, attended Johnson's examination at the hospital. According to Withers, Johnson cried, moaned, and appeared to be in great pain. Johnson said that Mitchell had hit her with a screwdriver and had threatened to stab her with it. She said he strangled her for 15 to 20 minutes. The blood vessels in Johnson's eyes were broken; her neck was bruised; her injuries were consistent with having been bound around the neck, wrists, and ankles. Bruising on Johnson's chin indicated strangulation with an object or cord.

Withers identified photographs of Johnson taken at the hospital, which depicted blood on Johnson's eyebrows, nasal openings, and the side of her face. Johnson's left cheek was swollen, and her left jaw was swollen and bruised. The area

behind her ear and areas of her scalp exhibited bruising, and she had a laceration on top of her head. Withers testified it took great effort for Johnson to turn her body so that photographs could be taken.

At the hospital, Johnson told Deputy Rodriguez that Mitchell had arrived earlier in the morning to smoke dope. Johnson let him in and they argued about him smoking inside her house. Mitchell poked her body with the screwdriver.[7] She believed he would kill her. She had remained tied up about five to 10 minutes. During the interview, Deputy Rodriguez noted a wound about three inches long on Johnson's face. Johnson complained of pain all over her body.

Los Angeles County Sheriff's Deputy Benjamin Casebolt responded to Johnson's apartment complex at about 9:24 a.m. after receiving a domestic violence call regarding a suspect armed with a screwdriver. He observed Mitchell, who fit the suspect's description, near the apartment complex. Deputy Casebolt detained Mitchell. The deputy did not observe any injuries on Mitchell, and Mitchell did not complain of any injuries. When Deputy Rodriguez subsequently booked Mitchell, he too did not observe any injuries, and Mitchell did not complain about any injuries.

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[7] During direct examination, Johnson testified Mitchell picked up the screwdriver after he punched her, kicked her, and hit her with the chair, and he had it in his hand when he was tying her up. He did not do anything to her with it. During cross-examination, Johnson testified Mitchell put the screwdriver down when tying her up. She denied that Mitchell touched her with the screwdriver after he tied her up.

The following day, August 2, 2016, a jailhouse call between Mitchell and Laricka Bell, the mother of Mitchell's child, was recorded. During the call, Bell said Johnson[8] had "said it." The following exchange ensued: "[Mitchell:] What did [Johnson] say, that she took my . . . . [¶] [Bell:] No, no, she said that you ran out of Cleauthor [*sic*].[9] [¶] [Mitchell:] She said what? [¶] [Bell:] Because you ran out of Cleauthor [*sic*]. [¶] [Mitchell:] No, she took it. Ain't no [way] I ran out of Cleauthor [*sic*]. That's what I'm trying to tell you. . . . Ooh, the bitch took a nigger's shit, and this is what pissed a nigger off, and I'm telling her, 'Bitch, you going [to] sit here and lie to me[.]' "[10]

Johnson testified that a few days after the incident, Ladonna Mitchell (Ladonna), Mitchell's mother, telephoned her. Ladonna told Johnson what to say and do regarding Mitchell. Johnson told Ladonna that she would say or do something to try to help Mitchell. Johnson acknowledged that she might have told Ladonna that she would lie.

In a recorded jailhouse call between Johnson and Mitchell at 10:14 a.m. on August 3, 2016, Johnson said, "I told [Ladonna], I was going to go and tell, uh, let them know that I lied on you,

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[8] During the call, Bell did not identify Johnson by name but referred to a "girl." Mitchell concedes the girl was Johnson.

[9] As discussed *post*, Johnson testified "Cleauthor" was "crack."

[10] At 9:59 a.m. on August 3, 2016, another jailhouse call between Mitchell and Bell was recorded. After the two discussed Mitchell's charges, Mitchell told Bell he was telling her "to call." The following then occurred: "[Bell:] Call who? [¶] [Mitchell:] Her. [¶] [Bell:] No, I'm not going to jail, nigger. [¶] [Mitchell:] Okay, well you don't have to."

that . . . your girlfriend beat me up and I was mad and I told them that you did it." The following conversation also took place: "[Mitchell]: . . . you said, 'Uh, I swear, I would never tell nobody,' and you tell my mama I ran out of [unintelligible], huh? [¶] [Johnson]: No, I did not. . . . [¶] [Mitchell]: Yeah. [¶] [Johnson]: She's been talking to—oh God in heaven, no, I did not. . . . She was talking about, uh baby powder I was not—we did not discuss no [unintelligible] [.] [¶] [Mitchell]: Yeah. [¶] [Johnson:] . . . I ain't tell her none of that. [¶] [Mitchell:] Yeah, uh she getting at me talking about I ran out [unintelligible] and I started tripping on you. I said, 'I guess.' "[11]

At trial, Johnson suggested that in the 10:14 a.m. call on August 3, Mitchell was telling Johnson that she had told Ladonna that Mitchell had run out of "Cleauth[o]r." Johnson testified "Cleauth[o]r" meant "drugs" and, in particular, "crack." Johnson also testified "baby powder" meant powder cocaine.

Mitchell presented no defense evidence.

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[11] At 10:28 a.m. that same day, Mitchell had a recorded conversation with both Ladonna and Johnson. During the conversation, the following occurred: "[Ladonna:] All she have to do is basically you wasn't the one that did it, nigger. [¶] [Mitchell:] Mama, but she already said I did. [¶] [Johnson:] [Unintelligible] that I was mad. [¶] [Ladonna:] She could lie and she could perjure herself, Telly. Do you understand that? [¶] [Mitchell:] [Unintelligible.] [¶] [Ladonna:] Huh? [¶] [Mitchell:] Alright. [¶] [Ladonna:] They . . . she can perjure herself. They might give her 30 days, 60 days, something like that for lying. [¶] [Mitchell:] Yeah, they do stuff like that, Mama, but you think she going to turn herself for—you . . . well, I don't know. [¶] [Johnson:] Yes, I will."

DISCUSSION

I. Sufficient Evidence Supports Mitchell's Torture Conviction

Mitchell claims insufficient evidence supports his torture conviction. As discussed *post*, torture requires that the perpetrator harbor "[*specific*] *intent to cause cruel* [*and*] *extreme pain and suffering for the purpose of revenge*, extortion, persuasion or *for any sadistic purpose*." (§ 206, italics added.) Mitchell argues there was insufficient evidence he had the above italicized intent.[12] We reject Mitchell's claim. For the reasons discussed below, we conclude there was sufficient evidence Mitchell had a specific intent to cause cruel and extreme pain and suffering for the purpose of *revenge*; therefore, it is unnecessary to discuss whether he harbored a sadistic purpose.

A. *Standard of Review and Applicable Law*

When addressing a claim that the evidence is sufficient to support a conviction, " 'we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most

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[12] The People did not contend below or on appeal that there was sufficient evidence of intent for the purposes of extortion or persuasion and thus we do not address those purposes.

favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' [Citation.]" (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

The crime of torture has two elements: "(1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of *revenge*, . . ." (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223, italics added.) "[G]reat bodily injury" in the context of torture means " 'a significant or substantial physical injury.' " (*People v. Hale* (1999) 75 Cal.App.4th 94, 108.)

Our Supreme Court has referred to torture's specific intent as " 'torturous intent' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1187), i.e., intent to torture. The general principles discussed below, applicable to that intent as a whole, necessarily apply to the component " 'for the purpose of revenge' " in particular. (*Ibid.*) In our later analysis, we will apply these principles to determine whether there was sufficient evidence

that Mitchell harbored an intent to cause extreme pain or suffering for the purpose of revenge.

The crime of torture "focuses on the *mental* state of the perpetrator" and not on the pain inflicted on the victim. (*People v. Hale, supra,* 75 Cal.App.4th at p. 108, italics added.) "The *intent* with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense." (*People v. Massie* (2006) 142 Cal.App.4th 365, 371, italics added.) Thus, "the severity of a victim's wounds is not necessarily determinative of *intent to torture*. Severe wounds may be inflicted as a result of an explosion of violence [citation] or an 'act of animal fury' [citation]. [¶] It does not follow, however, that . . . the nature of the victim's wounds cannot as a matter of law be probative of intent. . . . The condition of the victim's body may establish circumstantial evidence of the requisite *intent*." (*People v. Mincey* (1992) 2 Cal.4th 408, 432-433, italics added.)

Moreover, "[a]lthough evidence of binding, by itself, is insufficient to establish an *intent to torture* [citation], it is appropriate to consider whether the victim was bound and gagged, or was isolated from others, thus rendering the victim unable to resist a defendant's acts of violence [citations]." (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1188, italics added; accord, *People v. Proctor* (1992) 4 Cal.4th 499, 532 [victim isolated and prevented from resisting or escaping].)

B. *Analysis*

As to whether Mitchell harbored "specific intent to cause cruel and extreme pain and suffering,"[13] there is substantial evidence that after Mitchell slapped Johnson's face and punched her head several times with his fists, he hit her with a chair, threw her around the bedroom, and later kicked her face and neck causing her head and nose to bleed. He subsequently bound her legs with a long string and her wrists with an extension cord, then strangled her with ligatures, i.e., shoestrings and a cord attached to a flat iron. The testimony of the People's witnesses detailed Mitchell's assault upon, and the substantial injuries to, Johnson's head, forehead, face, eyes, nose, chin, neck, left arm, hand, wrists, ankles, and body, despite her screams, protests, and resistance.

Regarding the strangling in particular, Mitchell tied the cord around the neck of the helpless and injured Johnson so tightly she could barely breathe. He then left her to her own devices to survive; the flat iron cord remained around her neck for 15 to 20 minutes. The flat iron weighted down the cord, further restricting her breathing, exacerbating Johnson's distress.

In sum, substantial evidence established that Mitchell first beat up Johnson, she was screaming, and he prevented her from escaping by tying up her hands and feet so much as to cause bruising. He then tightened a weighted electrical cord and shoestrings around her neck so tightly as to cause burst blood vessels in her eyes and an inability to breathe normally for at

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[13] Mitchell does not expressly challenge the sufficiency of the evidence that he "inflicted great bodily injury."

least 10 minutes. All of this terrorized her and convinced her that she was going to die.

Further, at some point(s) during the encounter, Mitchell poked Johnson with a screwdriver. Nurse Withers testified that Johnson told her that Mitchell had hit her with the screwdriver and had threatened to stab her with it. Deputy Rodriguez testified that Johnson told him that Mitchell poked her body with the screwdriver. While Johnson testified that Mitchell was holding the screwdriver but did not do anything to her with it, "it is the jury, not the reviewing court, that resolves conflicts in the evidence." (*People v. Solomon* (2010) 49 Cal.4th 792, 818.) There was sufficient evidence Mitchell had the requisite "[specific] intent to cause cruel [and] extreme pain and suffering."

As to whether Mitchell harbored "the purpose of revenge" (*People v. Baker, supra*, 98 Cal.App.4th at p. 1223), Mitchell's own August 2, 2016 recorded statement to Bell reflected that, according to Mitchell, he inflicted the injuries on Johnson because Johnson had taken Mitchell's drugs and had lied to him about it. The statement provided substantial evidence of revenge.

We conclude there was substantial evidence to convince a rational trier of fact, beyond a reasonable doubt, that Mitchell committed torture.

None of the cases cited by Mitchell or his arguments, compels a contrary conclusion. In light of the above analysis, we reject Mitchell's contention that there was overwhelming evidence the incident involved an explosion of violence rather than an intent to torture.

Mitchell also argues that there was insufficient evidence that he had specific intent to cause cruel and extreme pain and

suffering *for the purpose of revenge*, because there was a reasonable inference from the evidence that he was lying to Bell about his motive for his behavior. He asserts he falsely told Bell that Johnson took his drugs, and he falsely told that to Bell "to justify his behavior that day to his significant other [Bell]—on whom he was having an affair [with Johnson]." However, the jury reasonably could have concluded that he was not lying to Bell.

In the same vein, Mitchell explains that in the call with Johnson, he told Johnson that he had told his mother he "*ran out* of drugs," not that Johnson *took* his drugs, thus negating the revenge theory. However, the jury was not obliged to believe him, particularly in light of his own contrary statements that he beat Johnson because she had taken away his drugs. The determination which evidence was credible was within the exclusive province of the jury. (See *People v. Penunuri*, *supra*, 5 Cal.5th at p. 142.)

II. No Ineffective Assistance of Counsel Occurred

Mitchell claims he was denied effective assistance of counsel by his counsel's failure to investigate Mitchell's mental history and present a mental impairment defense to the torture charge. Thus, he argues, he was prejudicially barred from presenting evidence negating intent to torture. Mitchell has failed to meet his burden to demonstrate ineffective assistance of counsel.

A. *Additional Background Information*

The probation officer's report indicates that a criminal history reporting system showed Mitchell "has a special handling

code of mentally disturbed," and he was prescribed Fluoxetine HCL.[14] Mitchell was involved in gang activity with the Pacoima Piru gang and admitted involvement with another gang. In July 2016, before the instant offenses, and while Mitchell was on probation, his case was transferred to a probation officer "from a mental health caseload." The probation officer met with Mitchell only once because Mitchell absconded from supervision. Another probation officer previously had stated that Mitchell had failed to report to probation in accordance with instructions, and had failed to participate in mental health counseling.

During trial, the court and Mitchell's trial counsel, Adam Koppekin, discussed whether Mitchell would testify. Koppekin told the court he had advised Mitchell that Mitchell's extensive criminal history included several felony convictions and crimes of moral turpitude, which the People could use to impeach Mitchell if he testified. Koppekin later gave the court a "CLETS" printout.[15] The court and parties then discussed Mitchell's criminal history. Mitchell subsequently elected not to testify.

After his conviction, Mitchell obtained new counsel, Robert Nadler, who filed a motion for a new trial based on ineffective assistance of counsel predicated upon counsel's failure to raise a

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[14] Fluoxetine HCL is the chemical name for Prozac. It is an antidepressant. (<https://pubchem.ncbi.nlm.nih.gov/compound/fluoxetine_hydrochloride>.)

[15] "CLETS" is an acronym for the California Law Enforcement Telecommunications System, an automated criminal history database. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1128.)

mental state defense. The written motion contained no supporting declaration from Koppekin.

At the hearing on the motion, Nadler made the following unsworn representations: Nadler had represented Mitchell 10 years before, and Mitchell then had an extensive mental health history. He had suffered mental health problems since birth. Koppekin was "possibly" unaware of Mitchell's mental health history. Several weeks prior to the hearing, Nadler had asked Koppekin whether Koppekin had looked into Mitchell's mental health issue. Koppekin "indicated . . . no, almost with surprise."

The People presented no witnesses at the hearing on the new trial motion. Bell, Ladonna, and Mitchell testified on behalf of Mitchell. No mental health professional testified. Bell testified that she had known Mitchell for almost 20 years. He had "psychiatric issues," had a "mental kind of retardation," was "mentally disabled," and was schizophrenic. He was taking medication for these issues. Bell stated that she had conversations with Mitchell's attorney before and during the trial; she did not discuss Mitchell's mental health issues with the attorney, and the attorney did not inquire about them.

Ladonna testified Mitchell had manifested psychiatric issues from the time he was five or six years old. As a child he had "hypertension." These mental health issues continued throughout his life. Ladonna hired an attorney[16] to represent Mitchell. The attorney never spoke to Ladonna about Mitchell's mental health issues. However, Ladonna told the attorney about

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[16] Ladonna did not identify who the attorney was. We note Nadler later told the court that Ladonna had retained a law firm and the retained lawyer was not Koppekin.

Mitchell's "mental problem." The attorney said he was going to get a "psychological."

Mitchell testified that throughout his life he had suffered with "ADA, attention disorder, and just being hyper all [his] life." He was on Ritalin from age 4 through age 14, but claimed "they stopped me" when he went to jail from age 14 through age 25. In the 1980's, he was in a psychiatric facility. He received no psychiatric care in prison. He took Thorazine while in custody. Mitchell's trial counsel never discussed Mitchell's mental health history with him. Mitchell believed he "probably" discussed with counsel the issue of a doctor, psychiatrist, or psychologist evaluating him in jail, but no such evaluation occurred.

Nadler argued that Koppekin had provided ineffective assistance of counsel by failing to investigate Mitchell's mental health issues, failing to discuss them with Mitchell's family, and failing to have a doctor evaluate Mitchell for competency and mental health defense issues. Nadler conceded, "I would conjecture possibly—I did not subpoena his defense lawyer to this hearing."

Nadler also argued that "we don't really know" Koppekin's position. It "seems like [the defense counsel] were either put on some notice about this issue or possibly they weren't." Nadler was "not going to speculate what either of those lawyers knew or didn't know."

The court commented that the probation officer's report did not indicate that Mitchell had ever been committed to a mental hospital. The report did not say why Fluoxetine HCL had been prescribed for Mitchell. The court stated it did not "see anything indicating any commitments to mental facilities or any sort of

[section] 1368 proceedings." Nadler denied knowing anything of that nature. The court denied the motion.[17]

B. *Analysis*

" 'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) On appeal, we " 'defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] [The d]efendant's burden is difficult to carry on direct appeal, as [the courts] have observed: " 'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.' " [Citation.]' [Citation.] If the record on appeal ' " 'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected," ' and the 'claim of ineffective assistance

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[17] Mitchell does not expressly claim the trial court erred by denying the motion; therefore, the issue of whether that denial was proper is not before us.

in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 876, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104; see *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Even assuming arguendo that Koppekin knew Mitchell had a mental health problem[18] and did not investigate it,[19] Mitchell has failed to demonstrate prejudice. At the hearing, no mental health professional testified that Mitchell's ostensible mental health issue(s) precluded him from formulating the requisite intent for torture. On this record, no ineffective assistance of counsel can be said to have occurred.[20]

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[18] Mitchell asserts that his trial counsel knew that Mitchell was mentally impaired. However, Nadler's comments suggest Koppekin may not have known, a fact weakening Mitchell's ineffective assistance claim. Nonetheless, the preconviction probation officer's report provided evidence Mitchell had mental health issues, and the report indicated his probation case had been assigned to a mental health caseload. Koppekin's comments preceding Mitchell's election not to testify at least suggest Koppekin had possessed a copy of the report and had reviewed it. We assume without deciding that Koppekin knew that Mitchell was mentally impaired.

[19] As mentioned, Nadler, in unsworn representations, told the court he asked Koppekin whether Koppekin had looked into Mitchell's mental health issue, and Koppekin had replied no. However, "[i]t is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 11.)

[20] To the extent Mitchell suggests his ineffective assistance argument applies to his other convictions in this case and/or that the alleged ineffective assistance prevented him from presenting

III. There Is No Need To Remand For The Court To Consider Senate Bill No. 1393

In a supplemental letter brief, Mitchell contends that we should remand this matter so that the trial court can exercise its discretion under section 1385, subdivision (b), whether to strike his section 667, subdivision (a) prior serious felony conviction enhancement pursuant to Senate Bill No. 1393. We reject this contention.

A. *Pertinent Facts*

Mitchell's probation report reflects an extensive criminal history. Mitchell was born in October 1975. As a juvenile, he suffered sustained petitions in the following years for the following offenses: 1987, sexual battery by restraint (§ 243.4, subd. (a)); 1989, burglary (§ 459); and 1990, murder (§ 187), three counts of attempted robbery (§§ 211, 664), and taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)).

As an adult, Mitchell suffered the following convictions for the following offenses: 2001, possession of a narcotic controlled substance (Health & Saf. Code, § 11350, subd. (a)); 2002, disorderly conduct (§ 647, subd. (f)), failure to appear (§ 853.7), and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)); and 2003, making a false bomb report (§ 148.1, subd. (a)), hit and run (Veh. Code, § 20002, subd. (a)), and providing false information to a police officer (Veh. Code, § 31).

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insanity or "idiocy" defenses below, we reject those suggestions as well for similar reasons.

There was more: 2006, felony evading a peace officer (Veh. Code, § 2800.2, subd. (a)); 2007, felonious assault (§ 245, subd. (a)(1)); 2008, possession of one ounce or less of marijuana while driving (Veh. Code, § 23222, subd. (b)) and driving with a suspended license (*id.*, § 14601.1, subd. (a)); and 2010, taking a vehicle without the owner's consent (*id.*, §10851, subd. (a)). This continued: 2011, driving with a suspended license (*id.*, § 14601.1, subd. (a)); 2013, child cruelty (§ 273a, subd. (a)), felony evading a peace officer (Veh. Code, § 2800.2, subd. (a)), and drunk driving (*id.*, § 23152, subd. (b)); and 2016, driving with a suspended license (*id.*, § 14601.2, subd. (a)) and driving without a license (*id.*, § 12500, subd. (a)). Mitchell was sentenced to prison for the 2001 conviction, for the 2002 narcotics conviction, for each 2007 and 2010 conviction, and for each 2013 conviction.

During the sentencing hearing in this case, the court indicated it had read the probation report. While discussing the new trial motion, the court commented that Mitchell had "an incredible criminal history dating back to age 11."

Mitchell later made a section 1385 motion to strike his strike pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court indicated it had carefully reviewed the probation report. The court detailed Mitchell's prior convictions; it observed that Mitchell "ha[d] a very long and consistent criminal history," he had been incarcerated most of his life after the age of 13, his offenses were increasingly serious, his performance on probation was horrible, and he had multiple parole violations. The court stated Mitchell "is precisely the type of individual for [whom] the three strikes law was created," and the court denied the motion. Mitchell's counsel asked the court to

impose concurrent sentences or to "merge" them, and "to frankly impose the lightest possible sentence that the law would allow."

The court sentenced Mitchell to prison for 14 years to life on count 1 (seven years as the minimum parole eligibility term, doubled as a second strike), plus five years for the prior serious felony conviction pursuant to section 667, subdivision (a), plus three one-year prior prison term enhancements pursuant to section 667.5, subdivision (b).[21]

As to each of counts 2 and 3, the court imposed eight years in prison for the offense (the four-year upper term, doubled as second strikes), plus five years for the section 12022.7 great bodily injury enhancement, five years for the prior serious felony conviction enhancement, and three one-year prior prison term enhancements. However, pursuant to section 654, the court stayed the sentences on counts 2 and 3.

B. *Analysis*

"On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court

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[21] As mentioned, Mitchell admitted five section 667.5, subdivision (b) enhancements. However, the trial court later struck one of those enhancements because two were based on prison terms that Mitchell had not served separately, and the court struck another such enhancement because it was based on a conviction that also supported a section 667, subdivision (a) enhancement.

[was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously has been convicted of a serious felony' (§ 667[, subd.] (a)), and the court [had] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.' (§ 1385[, subd.] (b).)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

In *Garcia*, the "[d]efendant claim[ed] Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction [was] not final when Senate Bill 1393 [became] effective on January 1, 2019." (*People v. Garcia*, *supra*, 28 Cal.App.5th at pp. 971-972.) The court agreed. (*Id*. at p. 972.) The court observed that, under the rule of *In re Estrada* (1965) 63 Cal.2d 740, "absent evidence of contrary legislative intent, 'it is an inevitable inference' that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective." (*Garcia*, *supra*, at p. 972.) The court concluded that "under the *Estrada* rule, as applied in [subsequent cases], it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 [became] effective on January 1, 2019." (*Id.* at p. 973.)

The People concede, and we agree, that because Mitchell's judgment is not yet final, Senate Bill No. 1393 retroactively applies to him. However, they note that "[w]e are not required to remand to allow the court to exercise its discretion if 'the record shows that the trial court clearly indicated when it originally

sentenced the defendant that it would not in any event have stricken [the] . . . enhancement' even if it had the discretion. [Citation.]" (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.) The People argue that the court's sentencing statements make that showing. We agree.

Even before the court pronounced sentence, the court stated during discussions about Mitchell's new trial motion that he had "an incredible criminal history dating back to age 11." Similarly, during discussions about Mitchell's *Romero* motion, the court said he "ha[d] a very long and consistent criminal history" and was "precisely the type of individual for [whom] the three strikes law was created." Those comments demonstrate that the court viewed Mitchell as a career criminal, undeserving of leniency.

The court imposed upper terms even on sentences stayed pursuant to section 654. Further, although the court had discretion to strike one or more of the one-year prior prison term enhancements pursuant to section 1385, subdivision (a) (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391; see *People v. Bonnetta* (2009) 46 Cal.4th 143, 145 [trial court may strike enhancement on its own motion]), the court did not do so. If the court did not strike a one-year enhancement when it had the discretion to do so, and after Mitchell's counsel asked the court to impose the lightest sentence the law would allow, there is no reason to believe, if given a chance, the court will strike a five-year section 667, subdivision (a) enhancement. A remand is thus unwarranted. (*People v. Jones*, *supra*, 32 Cal.App.5th at pp. 272-273.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.